In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No 79-73

ADELAIDE SHIPPING LINES, LTD.,
SALEN REEFER SERVICES AB, and M. V. GLADIOLA,
Petitioners,

vs.

SUNKIST GROWERS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, first entered in this case March 8, 1979, as to which rehearing was denied April 19, 1979.

OPINIONS BELOW

The findings and opinion of Judge Orrick of the United States District Court for the Northern District of California delivered orally are not officially reported[1] but are

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[1]Judge Orrick's opinion is reported as *Sunkist Growers v. Adelaide Shipping Lines* at 1976 A.M.C. 2597 (N.D. Cal. 1976).

set forth in Appendix A, *infra,* at pages 1A through 14A. The opinion of the United States Court of Appeals for the Ninth Circuit, which will be officially reported, is set forth in Appendix B, *infra,* at pages 1B through 33B. The Order of the Court of Appeals denying Appellees' petition for rehearing is set forth in Appendix C, *infra,* at page 1C.

JURISDICTION

On March 8, 1979 the Court of Appeals entered its judgment reversing the decision of the district court exonerating petitioners from liability under the terms of the Fire Statute and the Carriage of Goods By Sea Act. A petition for rehearing was timely filed April 3, 1979 and was denied April 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

QUESTIONS PRESENTED

1. Even though the Carriage of Goods by Sea Act (46 U.S.C. §§ 1300 *et seq.*) contains a saving clause (46 U.S.C. § 1308) which states that the provisions of COGSA "shall not affect the rights and obligations of the carrier" under the Limitation of Liability Act (46 U.S.C. §§ 181 *et seq.*), did the enactment of COGSA amend the earlier Limitation of Liability statute so as to make the defense of the Fire Statute (46 U.S.C. § 182) unavailable except upon the condition that the shipowner first demonstrate compliance with the provision of COGSA that "before and at the beginning of the voyage" it "exercise due diligence to . . . [m]ake the ship seaworthy"?

2. Is the fire exception of COGSA, 46 U.S.C. § 1304(2)(b), to be interpreted as meaning something different from

the Fire Statute, 46 U.S.C. § 182, the effect of which was expressly saved by COGSA in 46 U.S.C. section 1308?

3. If the answer to question No. 2 is affirmative and COGSA is to be read differently from the Fire Statute, then, where a charterer, as the carrier under COGSA, loses the benefit of the COGSA fire exemption, does it follow that the vessel owner loses the benefit of the Fire Statute which expressly and unqualifiedly confers its protection upon all owners?

STATUTES INVOLVED

Limitation of Shipowner's Liability Act (Fire Statute), 46 U.S.C. § 182:

> *No owner of any vessel shall be liable* to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or *by means of any fire* happening to or on board the vessel *unless such fire is caused by the design or neglect of such owner.* [Emphasis supplied.]

The Carriage of Goods by Sea Act, 46 U.S.C. §§ 1301(a), 1303 and 1304(1) and (2) and 1308:

> *§ 1301. Definitions*
>
> . . . .
>
> (a) The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.
>
> . . . .
>
> *§ 1303. Responsibilities and liabilities of carrier and ship*

Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
(a) Make the ship seaworthy;
(b) Properly man, equip, and supply the ship;
(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

. . . .

§ *1304. Rights and immunities of carrier and ship*

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

. . . .

(b) *Fire, unless caused by the actual fault or privity of the carrier;* [Emphasis supplied.]

§ *1308. Rights and liabilities under other provisions* The provisions of this Chapter shall not affect the rights and obligations of the carrier under the provisions of sections 175, 181-183, and 183b-188 of this title . . . [the Limitation of Liability Act, including the section (46 U.S.C. § 182) now called the Fire Statute].

STATEMENT OF THE CASE

This is an action for loss of cargo brought by cargo owners against the carrier of the cargo and the owners of the carrying vessel of which the carrier was the time charterer. The admiralty jurisdiction of the district court was invoked, and the case was tried before Judge William H. Orrick in the District Court for the Northern District of California. A month after the conclusion of trial, Judge Orrick delivered orally his findings of fact and conclusions of law (Appendix A), not following the frequent practice of leaving the findings to be sculpted by the prevailing party.[2] We commend to the Court the reading of the entire findings and conclusions, but for the purposes of this petition the facts may be set out in brief conclusory fashion based upon the findings.

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[2]Judge Orrick's careful and independent statement of findings and conclusions represented a practice to be highly commended for conformance with the views of this Court. *See United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964). No findings were held to be "clearly erroneous," yet the Court of Appeals gratuitously disparaged Judge Orrick's findings as "elastic and equivocal" (Opinion, Appendix B, page 14B). It is impossible to tell why the Court of Appeals did this. Perhaps it did not understand the case. Perhaps it was perplexed on seeing thoughtful and balanced findings rather than the usual lopsided findings prepared by one of the parties. Perhaps the Court of Appeals thought that as Judge Orrick delivered his findings and conclusions orally, they

Petitioner Adelaide Shipping Lines, Ltd. owned the M/V GLADIOLA (Finding 2). Petitioner Salen Reefer Services AB was the time-charterer of the M/V GLADIOLA (Finding 3). Respondent Sunkist Growers, Inc. shipped a cargo of lemons on the GLADIOLA (Finding 5).

While the GLADIOLA lay in the harbor of Guayaquil, Ecuador, a fire broke out in her engine room (Finding 9). The fire was caused by the separation of a joint in a fuel oil line and was fed by oil from the line (Finding 11). After the outbreak of fire the chief engineer collapsed in the engine room and for a considerable time efforts were made to locate and rescue him (Findings 13 and 14). The GLADIOLA was a modern vessel equipped with a CO_2 fire smothering system for such fires, but the master refused to turn on the CO_2 system and flood the engine room with CO_2 as a means of putting out this fire for fear of killing the chief engineer if he were still alive. The master delayed use of the CO_2 system until he was convinced that the chief engineer was dead. Rescue attempts were then abandoned, and the CO_2 was discharged into the engine room (Findings 13 and 14). Because of the delay in the use of the CO_2 system, the fire became too intense to be controlled by CO_2 (Finding 16), with the result that it rendered the refrigeration system inoperable (Finding 17), and the cargo of lemons was lost (Finding 18).

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were not a carefully drafted judicial product, and missed the significance of the fact that the findings which Judge Orrick read into the record had been prepared during the month after conclusion of the trial. We are confident that upon reading the findings and conclusions the court will observe that they are thoughtful and well articulated and in accordance with the guidance provided in *Dalehite v. United States,* 346 U.S. 15, 24, 1953 A.M.C. 1175, 1182 (1953). In fact the findings and conclusions were the product of extensive personal research by Judge Orrick.

Judge Orrick made no express findings on the subject of lack of due diligence to make the vessel seaworthy, since such findings were legally unnecessary. He did make a specific factual finding that a different ferrule (SERTO) should have been used instead of the one which was used in the separated joint (Finding 32) and that in retrospect the crew should have been given certain instructions with respect to fire fighting (Finding 33). He also found, however, that at most these failures were failures of vessel officers or crew rather than high-level corporate employees (Findings 32, 33 and 34) and found therefore that the fire was not caused by "actual fault, privity, design or neglect" of petitioners (Finding 35).

In his Conclusion of Law No. 4 he stated:

> In a fire loss case under the Carriage of Goods by Sea Act, or the Fire Statute, the owner or charterer has the burden of proving that the loss resulted from the fire. The burden then switches to the shipper to show that the fire was the result of the design, neglect, fault, or privity of the owner or charterer . . . .

He then relied upon *Asbestos Corporation Ltd. v. Compagnie de Navigation,* 480 F.2d 669, 1973 A.M.C. 1683 (2d Cir. 1973), in stating that the owner and charterer do not have the burden of initially proving that they exercised due diligence to make the vessel seaworthy as a condition to obtaining the benefit of the Fire Statute and COGSA fire exception. Judge Orrick discussed and rejected Canadian authority reaching a contrary result under the Canadian law, which does not include an equivalent of the

Fire Statute (Conclusion 5). Judge Orrick therefore exonerated the owner and charterer.

The Court of Appeals reversed Judge Orrick, holding that a showing of due diligence under COGSA was required before the benefit of either the Fire Statute or the fire exception in COGSA could be invoked either by the owners or the charterers.

It is true that COGSA obligates a carrier generally to exercise due diligence (ordinary care) to make the vessel seaworthy (reasonably fit) prior to the commencement of the voyage. It is also true that in general terms this duty is non-delegable by a vessel owner and may be breached by any crew member or shoreside worker employed by an independent contractor, no matter how subordinate the worker. The Court of Appeals, however, has now made this non-delegable duty of COGSA a part of the Fire Statute, explaining that COGSA, as "the more recent legislation," controls. Opinion, Appendix B, p. 25B.

The Court of Appeals has held the shipowner and the charterer responsible for fire damage caused by the negligence of persons lower in authority than a managing agent. In so holding, the Court of Appeals:

(1) ignored the saving clause (46 U.S.C. § 1308) and treated COGSA as having amended the Fire Statute;

(2) adopted the authority in Canada, where there is no fire statute, as controlling under the United States Fire Statute;

(3) misread prior decisions of the Court of Appeals for the Second Circuit[3], the Fourth Circuit[4] and of its own[5] to conclude that there was no authority in the United States in conflict with its conclusion, contrary to the texts of the cases themselves and to the views of commentators[6] and in reliance upon an unfounded distinction unsupported by any authority[7];

(4) ignored and did not discuss the distinction between owners and charterers under the Fire Statute.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted because the Court of Appeals has:

1. Decided a federal question in a way in conflict with an applicable decision of this Court; and

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[3]*Asbestos Corp. Ltd. v. Compagnie de Navigation*, 480 F.2d 669 (2d Cir. 1973); *Automobile Ins. Co. v. United Fruit Co.*, 224 F.2d 72, 1955 A.M.C. 1429 (2d Cir. 1955).

[4]*A/S J. LUDWIG MOWINCKELS REDERI v. Accinanto, Ltd.*, 199 F.2d 134, 1952 A.M.C. 1681 (4th Cir. 1952).

[5]*Albina Engine & Machine Works, Inc. v. Hershey Chocolate Corp.*, 295 F.2d 619, 1961 A.M.C. 2215 (9th Cir. 1961).

[6]Note, 5 J. Mar. L.&Com., 129, 133-34 (1973); Tetley, "Marine Cargo Claims", 114-15 (1965).

[7]The Court of Appeals in its opinion at Appendix B pp. 26B-29B treats this Court's decision in *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420, 1933 A.M.C. 1 (1932), as well as the *Automobile Insurance Co.* case (note 2, *supra*) and the *Accinanto* case (note 3, *supra*) as inapplicable upon the basis that the lack of due diligence (negligence) in those cases involved stowage of cargo and the totally erroneous assertion that the stowage of cargo was not involved in seaworthiness within the meaning of COGSA. The condition of stowage, like condition of the vessel itself, is, of course, an element of seaworthiness. *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 249, 250, 1943 A.M.C. 1209, 1210 (1943). Thus the law is diametrically opposed to the Court of Appeals' view that, "In other words, the failure to properly stow the goods has nothing to do with the failure to make the ship seaworthy . . . ." (Opinion, Appendix B, p. 26B.)

2. Rendered a decision in this case in conflict with the decisions of two other Courts of Appeals, those of the Second and Fourth Circuits, on the same matter; or

3. Decided an important question of federal law which has not been, but should be, settled by this Court.

The Decision Below Is in Conflict With An Applicable Decision of This Court..

In *Earle and Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420, 1933 A.M.C. 1 (1932), this Court decided the relationship of the Fire Statute to the Harter Act, 46 U.S.C. §§ 190 *et seq.*, four years before COGSA was enacted. The Harter Act imposed upon owners the requirement of due diligence to make the vessel seaworthy. This requirement of the Harter Act was adopted by the Hague Rules, and thus by COGSA, and has the same meaning in all three. The Harter Act did not itself contain a fire exception paralleling the Fire Statute, as does COGSA,[8] but, like COGSA, it contained a section (46 U.S.C. § 196) expressly saving the Fire Statute. This Court held that the Fire Statute was not affected by the requirement of due diligence to make seaworthy (notwithstanding that the Harter Act itself did not contain a parallel fire exception). If the Harter Act, with its saving clause, did not repeal or

[8]The fire exception in COGSA has been held to have the same effect as the Fire Statute itself. *A/S LUDWIG MOWINCKELS REDERI v. Accinanto, Ltd.*, 199 F.2d 134, 143-44, 1952 A.M.C. 1681, 1695-96 (4th Cir. 1952); *see Automobile Ins. Co. v. United Fruit Co.*, 224 F.2d 72, 75, 1955 A.M.C. 1429, 1434 (2d Cir. 1955); *American Tobacco Co. v. The KATINGO HADJIPATERA*, 81 F. Supp. 438, 445, 1949 A.M.C. 49, 58 (S.D.N.Y. 1948), *modified*, 194 F.2d 449, 1951 A.M.C. 1933 (2d Cir. 1951); *see also* Gilmore & Black, The Law of Admiralty, 834 (2d Ed. 1975) ("The Carriage of Goods by Sea Act, in slightly different wording, confers substantially the same exoneration on the carrier").

modify the Fire Statute, then COGSA, with its equivalent saving clause, likewise did not do so and there is no color of reason to suppose that the decision in *Earle and Stoddart Inc. v. Ellerman's Wilson Line, Ltd.*, did not dispose of the question for COGSA as it did for the Harter Act. Other courts until now have thought that it did, as this Court will observe from the cases with which the court below has placed itself in conflict.

The Court of Appeals sought to distinguish the *Earle and Stoddart* decision in part on the basis that it had involved "stowage." We will discuss the erroneousness of that supposed distinction below, as it relates to the Court of Appeals' attempt to apply it to the decisions of other Courts of Appeals, on the basis of stowage of cargo. It is perhaps enough to point out here that the *Earle and Stoddart* case involved providing bunker fuel for the vessel's use, as to which the erroneous rationale of the Court of Appeals as to cargo stowage could have no application.

The Decision Below Is in Conflict With Decisions of Other Courts of Appeals.

In deciding that the immunity granted by the Fire Statute and by the fire exception of COGSA is subject to the condition of an exercise of due diligence to make the vessel seaworthy before and at the beginning of the voyage, the Court of Appeals here has placed itself squarely in opposition to decisions of the Courts of Appeals of the Second Circuit and the Fourth Circuit, in addition to ignoring *sub silencio* its own earlier contrary decision.[9]

[9]In *Hershey Chocolate Corp. v. The SS ROBERT LUCKENBACH*, 184 F. Supp. 134, 1960 A.M.C. 1143 (D. Ore. 1960), *aff'd sub nom. Albina Engine & Machine Works, Inc. v. Hershey Choc-*

Reading the opinion here in isolation, one might suppose that other courts had not decided the question to the contrary or, if they had, had done so obscurely. Neither impression would be true.

In probably its first fire case arising under COGSA[10] the Court of Appeals for the Second Circuit, in *Hoskyn & Co., Inc. v. Silver Line, Ltd.*, 143 F.2d 462, 1944 A.M.C. 895 (2nd Cir. 1944), exonerated the vessel owner from the consequences of a fire started at an auxiliary diesel engine which was admittedly unseaworthy before the commencement of the voyage, because cargo owners had failed to prove that the fire had been caused by a specific condition as to which the shipowners were personally neglectful. In

olate Corp., 295 F.2d 619, 1961 A.M.C. 2215 (9th Cir. 1961), a repair contractor negligently started a fire in the hold of the vessel and cargo was destroyed. The piping of the ship's fire fighting system had been disconnected and, through the negligence of an employee, had not been reconnected to a shoreside source of water when the fire occurred. There is no question that this would have been a failure of due diligence under the non-delegable standards of COGSA. Judge Kilkenny, who wrote the opinion here and was then a district judge, exonerated the vessel, rejecting (184 F. Supp. at 139, 1960 A.M.C. at 1150) the notion that application of the Fire Statute was barred by unseaworthiness, relying upon *Earle and Stoddart, Inc. v. Ellerman's Wilson Line* (which he rejects here) and saying:

> The "neglect of the owner" mentioned in the statute means the owner's personal negligence, or in case of a corporate owner, negligence of its managing officers and agents as distinguished from that of the master or subordinates. [184 F. Supp. at 139, 1960 A.M.C. at 1149.]

The Court of Appeals affirmed in almost identical language (295 F.2d at 621, 1961 A.M.C. at 2218) and both courts cited as authority for the quoted proposition this Court's decision in *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 249, 1943 A.M.C. 1209 (1943).

[10]COGSA went into effect July 15, 1936, and the voyage commenced November 24, 1936, as shown by the district court opinion, *Hoskyn & Co., Inc. v. Silver Line, Ltd.*, 63 F. Supp. 452, 1943 A.M.C. 224 (S.D.N.Y. 1943).

doing so, the court stated the question, and dealt with it, entirely as one controlled by the terms of the Fire Statute as it had existed before the passage of COGSA and as it still exists. In other words, the question was one of design and neglect with respect to a specific cause of the fire, with no qualification of due diligence.

The same court decided in 1951 that both owner and charterer were entitled to exoneration for damage caused by fire to cargo carried under COGSA unless cargo proved actual design or neglect under the Fire Statute, without any qualification with respect to due diligence to make the vessel seaworthy. In *American Tobacco Co. v. The KATINGO HADJIPATERA*, 81 F. Supp. 438, 1949 A.M.C. 49 (S.D.N.Y. 1948), the district court had equated the Fire Statute and the COGSA fire exception and exonerated the owner but held the charterer under the Fire Statute for having negligently, and over the protest of the master, ordered the stowage of certain cargo alleged to have caused the fire. The Court of Appeals, in *American Tobacco Co. v. SS KATINGO HADJIPATERA*, 194 F.2d 449, 1951 A.M.C. 1933 (2d Cir. 1951), held that negligence had not been shown on the part of the charterer and so exonerated it also. Although the court referred to COGSA and adverted to the different burden of proof as to non-fire damage, it stated with respect to fire damage that "[n]o liability could be imposed unless the owners of those goods carried the burden of proving that the fire was caused by the shipowner's design or negligence or the carriers' actual fault or privity" (194 F.2d at 450, 1951 A.M.C. at 1934) (footnotes omitted), without any qualification respecting due diligence.

The following year the Court of Appeals for the Fourth Circuit, in *A/S LUDWIG MOWINCKELS REDERI v. Accinanto, Ltd.*, 199 F.2d 134, 1952 A.M.C. 1681 (4th Cir. 1952), *cert. denied*, 345 U.S. 992 (1953), squarely faced the same question and decided it directly contrary to the decision of the Court of Appeals in this case. The shippers there sued the charterer for cargo damage resulting from spontaneous combustion and explosion in a cargo of ammonium nitrate. The court assumed *arguendo* that the stowage was negligent but stated that negligent stowage by a competent stevedore would not constitute "actual fault or privity" on the part of the carrier. The court held that the COGSA fire defense and the Fire Statute have identical effect and gave full effect to both to exonerate the shipowner, notwithstanding that the negligent stowage assumed would have constituted a lack of due diligence to make the vessel seaworthy. In doing so, the Court of Appeals for the Fourth Circuit read this Court's decision in *Earle and Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, as being "[d]irectly in point" and also relied on the Second Circuit cases, *Hoskyn & Co. v. Silver Line*, and *American Tobacco Co. v. KATINGO HADJIPATERA*.[11]

The question was then raised again in the Court of Appeals for the Second Circuit, in *Automobile Insurance Co. v. United Fruit Co.*, 224 F.2d 72, 1955 A.M.C. 1429 (2d Cir. 1955). Although the case ultimately turned upon the complete absence of fault, the court stated its understanding as to liability for fire as follows:

> The immunity from liability for fire loss under the Fire Statute is not conditioned upon compliance with

[11] 199 F.2d at 143, 1952 A.M.C. at 1695.

> other statutes, or with Coast Guard Regulations [citations, including *Earle & Stoddart v. Ellerman's Wilson Line*]. There are no exceptions other than those expressed in the statute itself, *viz.*, "unless such fire is caused by the design or neglect of such owner".
>
> . . . .
>
> We think that Congress intended as a condition for recovery for damage due to fire loss to place the burden on cargo interests of establishing that the fire was caused by the design or neglect of the owner. Since 1851 there has been no indication of congressional intent to relieve cargo interests of that burden. The exemption provided by the Carriage of Goods by Sea Act, enacted in 1936, 46 U.S.C.A. § 1304(2)(b), was the same as that provided by the Fire Statute, and the purpose of the exemption was the same [citation]. Congress thus extended the benefits of the Fire Statute to a "carrier" though not a shipowner, or an owner *pro hac vice*. No case has been called to our attention which would indicate a tendency on the part of the courts to relieve cargo interests of that burden. [224 F.2d at 75, 1955 A.M.C. at 1434.]

Three years later, in *Petition of Skibs A/S JOLUND*, 250 F.2d 777, 1958 A.M.C. 277 (2d Cir. 1957), the Court of Appeals remanded a case to the district court for additional findings on the possible fault of owners as a basis for determining whether the vessel was exempted from liability under the Fire Statute and COGSA. Once again the court indicated that the matter was governed by the Fire Statute and, in describing the findings necessary for determination, it emphasized the possible design or neglect of the owners but made no reference to any possible finding of due diligence to make seaworthy as a condition to

the operation of the Fire Statute and fire exception of COGSA.

Still more recently, the Court of Appeals for the Second Circuit, in *Asbestos Corp., Ltd. v. Compagnie de Navigation,* 480 F.2d 669, 1973 A.M.C. 1683 (2d Cir. 1973) has again revisited the question. The district court in its decision[12] stated and applied proper standards, citing familiar cases from this Court and the Courts of Appeals and found that the owners at a high management level had indeed been guilty of personal neglect under the Fire Statute and could not be exonerated. The Court of Appeals affirmed, again applying the familiar standard and stating flatly:

> Pursuant to these statutory provisions [the Fire Statute and COGSA], shipowners are exempt from liability for cargo damage caused by shipboard fire except when the fire is "caused by the design or neglect of such owner" (Fire Statute) or unless the fire is "caused by the actual fault or privity of the carrier" (COGSA). These two phrases have essentially the same meaning. [480 F.2d at 672, 1973 A.M.C. at 1686.]

The court concluded by endorsing the district court opinion as well-reasoned.

The Court of Appeals for the Ninth Circuit in the instant case attempts to evade conflict by torturing the *Asbestos Corp.* case into an apparent abandonment of the standard the Court of Appeals for the Second Circuit has always stated and followed, and stated again in *Asbestos.* To do this the court below rests its analysis upon selective omis-

[12] *Asbestos Corp., Ltd. v. Compagnie de Navigation Fraissinet et Cyprien Fabre,* 345 F. Supp. 814, 1972 A.M.C. 2581 (S.D.N.Y. 1972).

sion of relevant text and abandonment of context. The Court of Appeals' analysis of *Asbestos* will not stand up against conscientious reading of the opinions in the district court and the Court of Appeals in that case.[13]

The Court of Appeals below has attempted to sweep aside all of the cases in the United States involving stowage of cargo, including this Court's decision in *Earle and Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.,* regarding bunker fuel oil for the vessel, on the basis of an erroneous analysis of COGSA from which the court concluded that negligent stowage of the cargo would not constitute a lack of due diligence to make seaworthy. (Opinion, Appendix B, p. 26B. The Court of Appeals' novel conclusion on this point was reached without the benefit of authority and is clearly wrong. Negligent stowage which causes a fire does render

[13] The district court had found that firefighting equipment was inadequate through owner's design or neglect and privity or knowledge. The Court of Appeals paraphrased this by saying the district judge had held the vessel "was unseaworthy because [owners] had failed to exercise due diligence in equipping the vessel" (480 F.2d at 671, 1973 A.M.C. at 1684). This can be taken as a true statement only by understanding due diligence to mean (as it does) the opposite of negligence and the reference to owners to refer to owners proper and not to subordinate employees or contractors.

The Court of Appeals unqualifiedly stated that owners were exempt absent actual fault or privity (480 F.2d at 672, 1973 A.M.C. at 1686). The only question then to be considered was whether the actual fault or privity must relate to the cause of the fire or might be read to relate more broadly to the cause of the damage. When the court went on, therefore, to talk of "an inexcusable condition of unseaworthiness" (480 F.2d at 672, 1973 A.M.C. at 1687) it should not be assumed to imply the opposite of its opening premise but to refer to that premise and to mean by inexcusable condition one which was caused by the owners' "actual fault or privity" or, in other words, his personal lack of due diligence.

Finally, the Court of Appeals, in affirming, unqualifiedly endorsed as "a well-reasoned opinion" (480 F.2d at 673, 1973 A.M.C. at 1688) the district court opinion which had discussed at greater length the standard for application of the Fire Statute and had cited and followed familiar cases treating it independently of due diligence.

the vessel unseaworthy at the commencement of a voyage, and this Court, in *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo,* has said so:

> The cause of the fire is found to be negligent stowage of the fish meal, which made the vessel unseaworthy. [320 U.S. at 250, 1943 A.M.C. at 1210.][14]

A fair reading of the relevant cases conclusively shows that the Court of Appeals opinion below is in serious conflict with the decisions of other circuits, and the conflict should be resolved by this Court.

The Court of Appeals Has Decided an Important Question of Federal Law which Should Be Settled by this Court if, Contrary to our Belief, It Has Not Already Been Settled by Earle and Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.

Congress has pointedly stressed the Fire Statute's importance by expressly preserving its full benefits (or trying to, at least) against the demands of both the Harter Act and COGSA by placing saving clauses in both those acts.[15] Fire at sea is a peril of frequency as well as intensity. A casual reference to annotations found with the Fire Statute at 46 U.S.C.A. section 182, and the COGSA fire exception in 46 U.S.C.A. section 1304(2)(b), show many reported

[14]This Court was there affirming a decision in which the Court of Appeals, although upholding exoneration as to the fire damage, was required to address the subject of due diligence in connection with the general average claim, and held:

> If the stowage was such as made a fire likely . . . she was unseaworthy. . . . It follows that, if due diligence was not used in her stowage, due diligence was not used to make her seaworthy. [*Consumers Import Co. v. Kawasaki Kisen Kabushiki Kaisha,* 133 F.2d 781, 785-86, 1943 A.M.C. 277, 284 (2d Cir. 1943).]

[15]46 U.S.C. § 196; 46 U.S.C. § 1308.

opinions. This is the tip of the iceberg since, in the usual course, most cargo claims are settled, and of those tried, even most appellate cases, do not reach the reports. The Courts of Appeals for the Second, Fourth and Ninth Circuits are important maritime law circuits, covering many of the east and all of the west coast states. Many cargo interests, shipowners and chartering companies have contacts on both coasts, and the causes of action are as transitory as the ships upon which they are based. The obvious conflict between the Second and Fourth Circuits on the one hand, and the Ninth Circuit on the other hand, will make forum shopping determinative of litigants' causes. As matters now stand, cargo interests will file in Ninth Circuit courts every "fire" case where any jurisdictional claim can be laid within that circuit.

As the decision below, if followed, would virtually emasculate the Fire Statute and the COGSA fire exception and lead to new and vicious forum-shopping among the circuits, clearly the question involved is an important one which should be settled by this Court if, contrary to our position, it has not already been so settled by the Court in *Earle and Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant a writ of certiorari to review the decision of the Court of Appeals, to restore the harmony which, until now, has existed, based upon regular reliance in the Courts of Appeals and district courts upon each other's decisions and the decision of this Court with respect to the application of the Fire Statute.

Respectfully submitted,

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(Appendices Follow)

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APPENDIX A

United States District Court,
Northern District of California,
May 21, 1976.

No. C-75-1021-WHO.

Sunkist Growers, Inc.,
Plaintiff,
vs.
Adelaide Shipping Lines, Ltd.; Salen Reefer Services AB; Salen Shipping Agencies, Inc.; M/V Gladiola,
Defendants.

WILLIAM H. ORRICK, D.J. (orally):

Findings of Fact.

1. Plaintiff Sunkist Growers, Inc., which I will refer to as Sunkist, is a corporation duly organized and existing under the laws of the State of California.

2. The Claimant Adelaide Shipping Co., Ltd., which I will refer to as Adelaide, is a corporation duly organized and existing under the laws of Great Britain and is the owner of the *M/V Gladiola*.

3. Salen Reefer Services AB, which I will refer to as Salen, is a corporation duly organized and existing under the laws of Sweden and was at all relevant times the time charterer of the *Gladiola*.

4. The *Gladiola* is a general cargo vessel of 11,890 summer deadweight tons built in 1972 at Aalborg, Denmark. She is under British registry and her officers are British.

5. During the last week of August and the first week of September, 1974, at the Port of Long Beach, California, a cargo of 58,464 cartons of fresh lemons in good order and condition was loaded on board the *Gladiola* for refrigerated transportation to Gdansk, Poland. In accordance with the terms of the bills of lading numbers POL-1 and POL-2, issued by Salen, at all material times, plaintiff was the owner of said cargo.

6. Plaintiff Sunkist and defendant Salen conducted their shipping transactions pursuant to a three-year contract. Defendants provided vessels once or twice a week to transport the plaintiff's citrus cargoes. Occasionally plaintiff could not fill an entire vessel with the cargo. In those instances, and under the terms of the contract, Salen would arrange for additional cargo to be shipped, and would make stops en route to load this extra cargo. Employees of Sunkist and Salen were in daily contact by telephone and Telex.

7. When additional cargo was to be transported, plaintiff was always informed by Telex of the type of cargo that would be loaded, and the additional stops that would be made in order to pick up the extra cargo. As long as the additional cargo would not adversely effect the citrus fruits shipped by the plaintiff, and as long as the additional loading stops did not unduly delay the ship's arrival in Northern Europe, plaintiff did not object to deviations from a direct course to Northern Europe.

In this instance, plaintiff was informed by Telex that the vessel would be stopping in Ecuador to load bananas. Plaintiff did not object to this deviation.

8. The route from Long Beach to Northern Europe via Ecuador was a reasonable route within the contemplation of the parties, considering their long-term business relations and the contractual permission given to load other cargo.

9. The vessel departed Long Beach on September 2, 1974, for Ecuador, arriving at Guayaquil, Ecuador, on September 10, 1974. While the vessel was anchored at Guayaquil on September 10, 1974, at 5:50 p.m., a fire broke out in the engine room of the *Gladiola* which necessitated evacuation of the crew from the engine room.

10. The vessel's deviation to Guayaquil did not cause the fire. Indeed, the fact that the ship was anchored in Guayaquil Harbor at the time facilitated the control of the blaze, since the crews of other ships and the Guayaquil Fire Department were able to assist in putting out the fire.

11. The fire was caused when a fitting in the fuel pipe leading to generator Number 1 separated. Fuel sprayed onto the exhaust turbocharger and ignited. The second and third engineers were the first to arrive at the fire. They attempted to control the fire by switching the electrical load off generator Number 1 to the ship's three other generators, in order to shut off generator Number 1. They did not immediately turn off the fuel supply to the flaming generator. They also attempted to control the fire with a 50 kilogram hand fire extinguisher. In the course of these

efforts, the second engineer turned the valve on the extinguisher in the wrong direction, broke the valve, and rendered the extinguisher inoperative. Their efforts to control the fire were unsuccessful.

12. Within five minutes the fire was so intense it could not have been controlled by manual fire-fighting techniques. A black, acrid smoke, caused by the ignition of butyl insulation on the electrical cables, filled the engine room, making it very difficult to see or to remain there.

13. The ship was equipped with remotely-controlled CO_2 fire-fighting equipment that would have controlled the fire at this point. The controls for this CO_2 system are located outside of the engine room and were not affected by the fire during the first hour of the blaze. Once the CO_2 system is activated, it forces CO_2 into the engine room, causes the oxygen to rise, and smothers the fire.

The Master hesitated to activate the CO_2 system, because the Chief Engineer had collapsed in the engine room and could not be located. Flooding the room with CO_2 would have suffocated the Chief Engineer if he were alive.

14. Efforts to rescue the Chief Engineer were made until 7:05 p.m., at which time the vessel's Master determined that the Chief Engineer was dead, and rescue attempts were abandoned.

15. The Master reasonably delayed activation of the vessel's remotely-controlled CO_2 fire-extinguishing system while attempts to rescue the Chief Engineer were undertaken.

16. Due to the delay during the rescue efforts, the fire was too intense to be controlled by the CO_2 system. The fire had also spread to the control room and accommodation sections of the vessel. The only way to extinguish the engine room fire was to flood the room with sea water. This was done.

17. The fire and flooding completely destroyed the ship's generators. The ship's refrigeration system was, in turn, rendered inoperative. Without refrigeration, the lemon cargo would have spoiled.

18. Although the defendants tried to arrange for alternative refrigeration, none was available. The only reasonable course was to donate the lemons to the people of Ecuador. The loss of the lemon shipment resulted from the fire.

19. The fire was not caused by the design, neglect, fault, or privity of the defendants. The defendants took all reasonable precautions to provide a structurally sound ship; to maintain the ship in good working order; and to man the ship with a capable and competent crew.

20. The *Gladiola* was constructed, equipped, maintained, and operated under the supervision of Lloyd's Register of Shipping. The ship had been given Lloyd's 100 A-1 classification. This is the highest possible classification available from Lloyd's. The vessel owner, in good faith, submitted all the vessel's specifications to Lloyd's for review; made the modifications suggested by Lloyd's; and took every reasonable step available to an owner to insure that the vessel complied with Lloyd's highest standards.

21. The *Gladiola* was also constructed in compliance with standards established by the British Department of Trade and Industry and Safety of Life and Sea (SOLAS) Convention requirements, and in conformity with industry standards and the practice of prudent vessel owners.

22. Once having obtained a high Lloyd's classification, the defendants took reasonable precautions to maintain the ship in good working order. Lloyd's conducted annual reviews of the vessel's structure and operating performance. Shortly prior to the fire, generator Number 1 and its fuel line were rechecked and reapproved.

23. To insure adequate upkeep of the vessel, a detailed log was maintained of all repairs that were made, and all problems with the engine room equipment. Mr. Cockerell, a Superintendent Engineer and high level shoreside employee of the vessel owner, personally visited the ship four times a year, and personally inspected the ship's log.

24. If Mr. Cockerell determined that repairs were necessary to maintain the ship in good working order, he did not hesitate to hire extra crewmen to perform the needed work. For example, one month prior to the fire, Mr. Cockerell had hired extra fitting labor in Hong Kong to make repairs on generator Number 4.

25. Prior to the fire in generator Number 1, Mr. Cockerell was never informed of any maintenance problems with that generator, or with the fuel line leading to that generator. The ship's log did not reflect that any repairs were required or made on generator Number 1.

26. The defendants also took all reasonable precautions to insure that the ship was manned with an adequate and capable crew.

27. Although English law only requires that a vessel be staffed with one certificated engineer, the *Gladiola* crew included at least two engineers. Mr. Cummings, the Third Engineer, had gone through a practical apprenticeship training program of at least five years. He had also been examined, graded, and approved by the British Government. Before a crew member was hired, he was required to complete a detailed application on his prior experience, including his fire-fighting training. He was also required to attend a personal interview. Follow-up checks were made on the applicant's credentials and training.

28. To attract the best possible crew to the *Gladiola*, the defendants offered excellent and competitive work benefits, including pay at higher than union wage, family living quarters on board, two months' paid vacation after four months' ship duty, and modern engineer equipment to work with.

29. All of the ship's engineers had gone through some practical training in fire fighting. The certificated engineers had attended a four-day fire-fighting course, where they were instructed in fire-fighting theory, and also participated in practical drills which included instruction in the use of fire extinguishers. Mr. Cummings, the Third Engineer, had not gone through the certification process and the four-day course, but he had received a practical fire-fighting course from a prior employer.

30. The crew participated in fire drills aboard the *Gladiola* every two weeks. Each man was trained, to report to a specific station on board. The purpose of these drills was to make sure the crew knew where the fire-fighting equipment was, and how to use it. Instructions for the proper use of the fire extinguishers were written on the extinguishers themselves.

31. In retrospect, the structure of the ship could have been safer in several aspects:

(1) The butyl lining on the electrical cables could have been sheathed in metal to reduce a blinding smoke in the event of fire;

(2) A flange joint, rather than a compression joint, could have been used on the fuel pipe leading into the generator, making a stronger connection;

(3) Fewer joints could have been designed in the pipe to reduce the possibility of leaks;

(4) Protective shields could have been placed around the generators to reduce the spray of hot fuel in the event of a leak;

(5) A SERTO ferrule could have been maintained in the particular fuel pipe joint that caused the leak, rather than the ERMERTO ferrule replacement that had been inserted;

(6) Barriers and fire dampers could have been placed along the electrical cabling to control the spread of fire throughout the ship;

(7) Suits of protective fire clothing could have been maintained on board.

32. Armed only with foresight, however, a prudent vessel owner and/or charterer would not necessarily have made most of these modifications. The modifications and additions that have been made with reasonable foresight would not have prevented the fire, or the destruction of the generator and the concomitant loss of refrigeration on board the *Gladiola*. Many British ships, classified by Lloyd's and SOLAS and the Department of Trade and Industry, use butyl linings on electrical cablings, and compression joints on low-pressure fuel lines such as the one that separated on the *Gladiola*. The multiple joint fuel pipe, used on board the *Gladiola*, is also in common usage, and the butyl insulation is widely accepted within the industry as safe. Although generator shields would reduce the amount of spray in the event of a leak, they could not have eliminated the spray altogether, and would not have prevented the fire in this instance. Although a SERTO ferrule should have been maintained in a particular joint, normal and reasonable external inspection, even by an experienced engineer, would not have revealed that an improper ferrule was in place. A failure to maintain the proper ferrule would be the fault of the crew in failing to report ferrule replacement, rather than the fault of the owner in failing to notice that a replacement had been made.

Although it would have been advisable for the safety of the rest of the ship to have fire barriers along the cabling, the spread of the fire did not cause the loss of the lemons, since the refrigeration system would have been destroyed if the fire had been contained in the engine room. Protective barriers would not have prevented the

destruction of the generators. Nor is it clear that the fire dampers would have prevented the spread of the fire once it was allowed to burn for the hour during the rescue search for the Chief Engineer.

Finally, while fire protection clothing would have been a wise addition to the ship's gear, the lack of such clothing on board the *Gladiola* did not cause the fire, did not cause the delay in locating the ship's engineer or in activating the CO_2 system, and did not cause the loss of the lemon cargo. The delay in locating the Chief Engineer was the result of the acrid, dense smoke, rather than the unbearable heat in the engine room.

33. In retrospect, it also appears that the crew should have been given specific instructions on the proper way to deal with engine room fires and the exact method of handling fire extinguishers. However, a reasonable owner and/or charterer, in preparing to deal with fires, would have relied on the certification of its crew members, along with their prior fire-fighting experience and training, ship drills, and excellent equipment labeled with instructions for use.

34. A reasonable owner and/or charterer would have relied on the ship's Master to tailor shipboard fire drills to a variety of fire situations, and to simulate fires, including engine room fires. Any failure to properly instruct the crew in the details of engine room fire-fighting techniques was the fault of the high level ship's crew, not the shoreside owner, charterer, or their high level employees.

35. The fire was not caused by the actual fault, privity, design, or neglect of the vessel owner or charterer.

Conclusions of Law.

1. This is a case of admiralty and maritime jurisdiction.

2. The owner of the vessel, Adelaide, is exonerated from liability by the U.S. Fire Statute, 46 United States Code, Section 182, and by the Carriage of Goods by Sea Act, 46 United States Code, Section 1304(2)(b).

3. The charterer, Salen, is exonerated from liability by the Carriage of Goods by Sea Act.

4. In a fire loss case under the Carriage of Goods by Sea Act, or the Fire Statute, the owner or charterer has the burden of proving that the loss resulted from the fire. The burden then switches to the shipper to show that the fire was the result of the design, neglect, fault, or privity of the owner or charterer. And I rely on the case of *Asbestos Co. Limited v. Compagnie de Navigation,* 1973 AMC at 1683, 480 F.2d 669 (2 Cir., 1973). In a fire case, the charterer and/or vessel owner do not have the burden of initially proving that they exercised due diligence in making the vessel seaworthy.

5. While this allocation of the burden of proof runs contra to the general scheme of proofs in shipping cases, since normally a shipper can recover merely by showing that he delivered the goods to the carrier in good condition and that the goods arrived damaged, American authority is clear that the fire exemption provisions shift the burden of proof to the shipper. The plaintiff's reliance on the Canadian authority of *Maxine Footwear Company v. Canadian Government Merchant Marine*, [1959] 2 Lloyd's Rep. 105, is misplaced. Although the Court in that case did place

the burden of proving initial seaworthiness on the carrier, that case was dealing with a Canadian statute fashioned on the Hague Rules.

Canadian commentator W. Tetley, in his treatise *Marine Cargo Claims,* acknowledges that Canadian and American allocations of proof differ in shipping fire cases, with the American authorities making it more difficult for the shipper to recover by imposing a heavy burden of proof.

6. The defendants Adelaide and Salen have sustained their burden of proof; the plaintiff Sunkist has not. Before liability is imposed, the negligence must be on the part of the owner/charterer, or their high-level shoreside employees. The owner or charterer are not liable for mere crew negligence. *Asbestos Corporation v. Compagnie de Navigation, supra.*

7. Mere reliance on compliance with Lloyd's or SOLAS certification criteria cannot insulate a vessel owner and/or charterer from liability. *Asbestos Corporation, supra.*

8. The test is whether a reasonable shipowner or charterer would have taken additional precautions to prevent or extinguish a fire.

9. This case is not controlled by the liability determinations made in *Asbestos Corporation, supra,* where liability was imposed (although the ship had complied with the SOLAS requirements) because a reasonable vessel owner would not have placed all the controls for fire-fighting equipment inside the engine room, the locale on board the ship where fires are most likely to occur, because in such a situation the fire-fighting equipment would most

likely be inaccessible or destroyed in the event of a fire. On the *Gladiola* the controls for the CO_2 fire-fighting equipment were located outside of the engine room. And it should be noted that the very CO_2 fire-fighting equipment that the Court in *Asbestos* suggested would have been appropriate was actually operative on the *Gladiola.*

10. Nor is this case analogous to the situation in *In re Liberty Shipping Corporation,* 509 F.2d 1249 (9 Cir., 1975), where liability was imposed upon a vessel owner who permitted a vessel to go to sea with a crew that did not know how to use the vessel's CO_2 system, and did not possess elemental knowledge of the properties or uses of CO_2.

On the *Gladiola* the crew knew how to use the ship's CO_2 system and did activate the system, once the efforts to rescue the Chief Engineer were terminated. The failure to control the fire was due to the crew's reasonable efforts to save the Chief Engineer, not to their incompetency.

11. Although the Carriage of Goods by Sea Act imposes liability on a vessel owner and/or charterer for losses resulting from unreasonable deviations from course and makes deviations for the purpose of loading or unloading cargo *prima facie* unreasonable, the deviation must be the proximate cause of the fire. Gilmore and Black, *The Law of Admiralty,* at 181; *Frederick Cone and Company v. Tai Shan,* 1955 AMC 420, 218 F.2d 822 (2 Cir., 1955).

12. The deviation to Ecuador was neither unreasonable in the light of the parties' past dealings and long-term shipping contract, nor was the deviation the proximate cause of the fire or the loss of the lemons.

13. Adelaide and Salen are entitled to judgment against Sunkist with costs to be assessed by the Clerk of this Court.

14. Defendants Adelaide and Salen shall lodge a form of judgment approved as to form by the plaintiff, on or before June 15, 1976.

APPENDIX B

United States Court of Appeals
Ninth Circuit

No. 76-3112

Sunkist Growers, Inc.,
Plaintiff-Appellant,
vs.
Adelaide Shipping Lines, Ltd.,
Claimant-Appellee,
and
Salen Reefer Services AB, and
M/V Gladiola,
Defendants-Appellees.

[Filed Mar. 8, 1979]

Appeal from the United States District Court
Northern District of California

OPINION

Before: DUNIWAY and KILKENNY, Circuit Judges, and McGOVERN, District Judge.*

KILKENNY, Circuit Judge:

This is an appeal in admiralty from a judgment dismissing appellant's complaint *in rem* and *in personam* against appellees for cargo damage aboard the vessel GLADIOLA.

*The Honorable Walter T. McGovern, United States District Judge for the Western District of Washington, sitting by designation.

FACTS

The facts are not seriously in dispute. Appellant [Sunkist] is a California corporation engaged in packing and shipping citrus fruit. Claimant [Adelaide] is a corporation organized and existing under the laws of Great Britain and is the owner of the vessel GLADIOLA, a general cargo vessel of 11,890 tons carrying capacity. Salen is a corporation organized and existing under the laws of the country of Sweden and at all times relevant herein was the charterer of the GLADIOLA.

During the last week of August and the first week of September, 1974, at the Port of Long Beach, California, a cargo of 58,464 cartons of fresh lemons in good order and condition, owned by Sunkist, was loaded on board the GLADIOLA for refrigerated transportation to Gdansk, Poland. Sunkist and Salen conducted their shipping transactions pursuant to a three year contract. Salen provided the vessels once or twice a week to transport Sunkist's citrus cargoes. Occasionally, Sunkist would not fill the entire vessel with its cargo and in those instances, and under the terms of the contract, Salen could arrange for additional cargo to be shipped and would make stops enroute to load this extra cargo. Employees of Sunkist and Salen were in daily contact by telephone and telex. When additional cargo was to be transported, Sunkist was informed by telex of the type of cargo that would be loaded and the additional stops that would be made in order to pick up the extra cargo. As long as the additional loading stops did not unduly delay the ship's arrival in Northern Europe, nor adversely affect the citrus crop shipped by

Sunkist, it did not object to deviations from a direct course to Northern Europe. In this instance, Sunkist was informed by telex that the vessel would be stopping in Ecuador to load bananas. It did not object. The GLADIOLA departed Long Beach on September 2, 1974, for Ecuador, arriving and anchoring in Guayaquil Harbor on September 10th.

On that day, at approximately 5:50 P.M., a fire broke out in the engine room. This room was automated and normally in unmanned status, as it was at the outbreak of the fire. The cause of the fire was a separation of a Serto compression pipe fitting and an Ermerto ferrule in the low pressure diesel fuel line of the vessel's number 1 generator. The diesel fuel sprayed on to hot surfaces of the numbers 1 and 2 generators.

Cummings, an extra third engineer in charge of answering alarms from the unmanned engine room, upon hearing the fire alarm, picked up his ear muffs and went to the engine room where he proceeded to the generator flat. He observed a break in the fuel line and oil splashing onto the hot exhaust turbo chargers of the numbers 1 and 2 generators. At that time there were no flames. Then occurred what might well be described as a Shakespearean comedy of errors, with a result akin to one of his tragedies. Because he had no training in fighting engine room fire and no one had instructed him on what to do in such an emergency, Cummings failed to use the diesel oil turn off screw two or three feet below the joint, nor, for the same reason, did he turn off another valve some twenty to twenty-five feet from the generator on the main diesel oil supply line. This valve could have been closed by pulling a pin on a quick release mechanism. The second engineer

arrived at the scene about this time but, inasmuch as his fire fighting training was no better than Cummings', he also failed to close either valve. After reporting the fire to the control room, Cummings returned to stop the generator, but when he returned the flames prevented him from getting close enough to the valve. While the fire was still confined to the number 1 generator and the area immediately above it, the second engineer attempted to use the 50 kilogram fire extinguisher but turned the control valve on the extinguisher in the wrong direction and broke it, rendering the extinguisher completely inoperative. The valve on this fire extinguisher was activated by screwing the valve clockwise, rather than counterclockwise. Cummings wasn't even aware of the location of this "left-handed monkey wrench." While the second engineer was rendering the large fire extinguisher inoperable, Cummings went back to the control room and reported the generator on fire. It was not until then that he shut off the fuel to the pumps on the number 1 generator by means of a simple switch.

The fire spread rapidly to the oil in the bilges and along the inflammable butyl insulated electric cable, thus filling the engine room with dense smoke. Within minutes the vessel blacked out and the engine room had to be evacuated. It was then determined that the chief engineer was still on the refrigeration flat. While attempting to locate the chief engineer, Cummings stumbled over his body. He appeared to be dead. After attempts to save the engineer failed, the captain finally ordered the remotely controlled CO_2 fire extinguisher system in action, but the fire was out of control and could not be extinguished by the use of this

system. Three days later, on September 13, 1974, the fire was extinguished, but the damage was very extensive. The chief engineer died in the fire and the captain suffered a fatal heart attack a couple of days later.

Although the lemons had not been damaged in the fire, the destruction of the refrigeration equipment made it necessary to find local refrigerated storage, local markets, or transshipment of the lemons. All of these efforts failed and it became necessary to give the lemons to the military authorities for distribution to the people.* The value of the lost lemon crop was stipulated at $350,784.00.

ISSUES ON APPEAL

From a decision of the district court holding that both appellees were protected from liability by the fire exemption statutes, appellant appeals and raises three issues:

I. Were appellees required to exercise due diligence to make the GLADIOLA seaworthy as a prerequisite to claiming a fire exemption under the Carriage of Goods by Sea Act of 1936, 46 U.S.C. §§ 1300, *et seq.*?

II. Was there a lack of due diligence on the part of appellees either in connection with the defects in the vessel which caused the fire and contributed to its spread or in failing to man the GLADIOLA with a crew properly trained in fighting fires in ships' engine rooms?

III. Did the GLADIOLA'S deviation to Guayaquil deprive the appellees of the fire exemption?

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*This may account for the unrest in Ecuador during the past few years.

DISTRICT COURT'S FINDINGS AND CONCLUSIONS

In its findings of fact, the district court found, among other things, that the GLADIOLA, prior to the commencement of the voyage, could have been made safe in the following respects:

> "(1) The butyl lining on the electrical cables could have been sheathed in metal to reduce a blinding smoke in the event of fire;
>
> (2) A flange joint, rather than a compression joint, could have been used on the fuel pipe leading into the generator, making a stronger connection;
>
> (3) Fewer joints could have been designed in the pipe to reduce the possibility of leaks;
>
> (4) Protective shields could have been placed around the generators to reduce the spray of hot fuel in the event of a leak;
>
> (5) A SERTO ferrule could have been maintained in the particular fuel pipe joint that caused the leak, rather than the ERMERTO ferrule replacement that had been inserted;
>
> (6) Barriers and fire dampers could have been placed along the electric cabling to control the spread of fire throughout the ship;
>
> (7) Suits of protective fire clothing could have been maintained on board." 1976 A.M.C. 2597, at 2602.

After making these findings, the court went on to say that a prudent vessel owner and/or charterer would *not necessarily have made most of these modifications,* including a statement that although a Serto ferrule should have been maintained in the particular joint, "A failure to maintain the proper ferrule would be the fault of the crew in failing to report ferrule replacement, rather than the fault of the

owner in failing to notice that a replacement had been made." Similar findings were made with reference to the other deficiencies mentioned by the court.

The court also found that the crew should have been given specific instructions on the proper way to deal with engine room fires and the exact method of handling fire extinguishers. Nonetheless, the court went on to say that a reasonable vessel owner and or charterer, in preparing to deal with fire, would have relied on the certification of its crew members, along with their prior fire-fighting experience and training, ship drills and equipment labelled with instructions for use.

Based on its findings of fact, the district court concluded, among other things:

> "
>
> 4. In a fire loss case under the Carriage of Goods by Sea Act, or the Fire Statute, *the owner or charterer has the burden of proving that the loss resulted from the fire. The burden then switches to the shipper to show that the fire was the result of the design, neglect, fault, or privity of the owner or charterer. And I rely on the case of Asbestos Co. Limited v. Compagnie de Navigation, 1973 AMC at 1683, 480 F.2d 669 (2 Cir., 1973). In a fire case, the charterer and/or vessel owner do not have the burden of initially proving that they exercised due diligence in making the vessel seaworthy.* [Emphasis supplied.]
>
> 5. While this allocation of the burden of proof runs contra to the general scheme of proofs in shipping cases, since normally a shipper can recover merely by showing that he delivered the goods to the carrier in good condition and that the goods arrived damaged, American authority is clear that the fire exemption

provisions shift the burden of proof to the shipper. The plaintiff's reliance on the Canadian authority of *Maxine Footwear Company v. Canadian Government Merchant Marine,* [1959] 2 Lloyd's Rep. 105, is misplaced. Although the Court in that case did place the burden of proving initial seaworthiness on the carrier, *that case was dealing with a Canadian statute fashioned on the Hague Rules."* [Emphasis supplied.] 1976 A.M.C. at 2604. [Emphasis supplied.]

THE STATUTES

The fire exemptions touching upon the problem before us are the 19th Century Fire Statute, 46 U.S.C. § 182 and the COGSA Fire Exemption, 46 U.S.C. § 1304 (2) (b).

The 19th Century Fire Statute provides:

"§ *182. Loss by fire*

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, *unless such fire is caused by the design or neglect of such owner.*" [Emphasis supplied.]

COGSA, §§ 1301(a), 1303 and 1304 (1) and (2), provide in pertinent part:

§ *1301. Definitions*

* * * * *

(a) The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper."

* * * * *

"§ *1303. Responsibilities and liabilities of carrier and ship*

Seaworthiness

(1) *The carrier* shall be bound, before and at the beginning of the voyage, *to exercise due diligence to*—

(a) *Make the ship seaworthy;*

(b) *Properly man, equip, and supply the ship;*

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation. [Emphasis supplied.]

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

* * * * *

"§ *1304. Rights and immunities of carrier and ship*

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness *unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied,* and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. *Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.* [Emphasis supplied.]

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

• • • • •

(b) *Fire, unless caused by the actual fault or privity of the carrier;*" [Emphasis supplied.]

• • • • •

HISTORICAL BACKGROUND

In order to fully understand the nature of the complex legal problems presented, we must view them in their historical context, including the Common Law of Maritime Carriage of Goods at Sea, the Limitation of Liability Act of 1851 (46 U.S.C. §§ 181-189), the Harter Act of 1893 (46 U.S.C. §§ 190-96), The Hague Rules as formulated by the Brussels Convention of 1924 and the Carriage of Goods by Sea Act of 1936 (COGSA) (46 U.S.C. § 1300, *et seq.*)

The Act of 1851 was passed by the Congress to promote the expansion of the American Merchant Marine and to protect the capital investment of those engaged in maritime shipping. It is clear that the legislation was enacted for the purpose of placing American ship owning interests on a competitive basis with British interests insofar as limitation of liability was concerned. Gilmore & Black, The Law of Admiralty, Second Edition, § 10-1, *et seq.*, pp. 818-24. In addition to the Fire Statute Limitation (§ 182), the 1851 Act permitted the owner to limit his overall liability to the value of his interest in the vessel. (46 U.S.C. § 183).

Because the various sections of the 1851 Act were enacted together, the cases construing one section are frequently used to interpret another. In construing the 1851 legislation, the courts have held that while an owner may rely on the fire exemption therein mentioned, a time charterer such as the appellee Salen, is not an owner within the meaning of the Fire Statute and is precluded from relying on § 182 for exemption. *In Re Barracuda Tanker Corp.*, 409 F.2d 1013, 1015 (CA2 1969).

The subsequent history of maritime common carriage makes it obvious that the COGSA Fire Exemption of 1936, as distinguished from the 1851 Fire Statute, was part of an overall plan to settle the adverse interests of carriers and cargo shippers. This history is outlined in Gilmore & Black, The Law of Admiralty, Second Edition, §§ 3-22 to 3-24, pp. 139-144.

From that history, we gather that the British Courts generally upheld the validity of what was then commonly known as the "negligence" exceptions in bills of lading, while the federal courts in the United States held it against public policy for the carrier to contract itself out of liability for its own negligence. Consequently, when goods were carried under a bill of lading containing such a clause, the accessibility of courts or amenability to service of process made a crucial difference in the outcome of the litigation. In part as a result of this difference, the British Merchant Marine became dominant in the Atlantic. The United States, of course, was vitally interested in seagoing cargo, both export and import. Therefore, to partially solve this problem, the Congress in 1893 enacted the Harter Act, 46 U.S.C. §§ 190-96, which Act attempted to strike a balance between the interests of the carrier in being free from all claims based upon its negligence, and the shippers who

wished to hold the carriers responsible for the consequences of any sort of negligence. In effect, the Harter Act declared "negligence" exceptions in the bills of lading to be null and void, but carriers would not be liable for goods damaged due to the shippers acts or omissions or for errors of the crew, if the carrier did exercise due diligence to make the vessel seaworthy and to properly maintain, equip and supply the vessel.

While this compromise served to protect a cargo shipper's interest with respect to litigation in American courts, shippers in most of the other countries of the world were still at the mercy of the exoneration clauses in the bills of lading, or at least of the different judicial interpretations of the clauses which carriers continued to carefully insert in the bills. As an outgrowth of the conflicts between these two warring factions, the interested antagonists, which included banking and underwriting interests, met at the World's Shipping Conference of 1920 to put the Harter Act principle into effect generally. As an outgrowth of these meetings, the Brussels Convention of August 25, 1924, promulgated what are commonly known as The Hague Rules which, with important additions,[a] amounted to an international adaptation of the Harter Act. However, the United States did not ratify the Convention or enact COGSA, a statutory codification of The Hague Rules, until 1936.

It is well recognized that The Hague Rules or COGSA have superseded the Harter Act with respect to foreign

[a]See Appendix A.

trade and are *incorporated by reference in every bill of lading*[1] for foreign transport to and from the United States. It has been said that the primary purpose of COGSA is to protect carriers engaged in foreign trade to and from the United States against all-encompassing liability, while protecting the shipper's interest *by assuring that due care is exercised in making the ship seaworthy. Wirth, Ltd. v. S/S ACADIA FOREST,* 537 F.2d 1272, 1279 (CA5 1976). The intent of the Congress in passing COGSA is made absolutely clear by the language of Paragraph (8) of Section 3 of the original enactment, 49 Stat. 1209, 46 U.S.C. § 1303 (8).

> *"Limitation of liability for negligence*
>
> (8) Any clause, covenant, or agreement in a contract of carriage *relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section,* or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. . . ." [Emphasis supplied.]

This is the section which requires the carrier before and at the beginning of the voyage to exercise due diligence to (a) make the ship seaworthy; and (b) properly man, equip, and supply the ship.

[1]It is specifically incorporated into the two bills of lading covering this particular shipment (Exhibits 1030, 1031) under Part A, § II, which reads:

"Paramount Clause. The Hague Rules contained in the International Convention for unification of certain rules relating to bills of lading, dated Brussels the 25th of August, 1924, as enacted in the country of shipment shall apply to this contract . . ."

DISCUSSION

As we read the record, along with the elastic and equivocal findings of fact of the district court, there is overwhelming evidence that the appellees were in violation of 46 U.S.C. §§ 1303 and 1304 of COGSA before and at the inception of the voyage in two respects:

(1) It is undisputed that the carrier failed to provide a proper Serto ferrule fitting in the low compression fuel joint that separated. It is also undisputed that the fitting had not been touched after the commencement of the voyage. This separation permitted the diesel oil to spray upon the hot generator parts, thus causing the fire. Moreover, the failure to use a flanged, rather than a compression joint in the fuel line is a clear violation of Lloyd's Rule, Chapter E, § 312.[2] The appellees' witness Seymour conceded that Rule E312 applied to the joint in question and that the joint was not flanged as required by the rule. There is no evidence that Lloyd's ever granted a variance of this rule. The fact that the district court said that compression joints on low pressure fuel lines were used on "many British ships" is of no importance. Mere compliance with a custom which falls below the United States' and Lloyd's standards is not sufficient. *See Texas & Pacific Railway Co. v. Behymer,* 199 U.S. 468, 470 (1903); *Waterman Steamship Corp. v. Gay Cotton,* 414 F.2d 724, 738-39 (CA9 1969). Even appellees' own witness, Mr. Young, would not testify that Serto joints as used on the GLADIOLA were common.

[2]"Transfer, suction and other low pressure oil pipes and all pipes passing through oil storage tanks are to be made of cast iron or steel, having flanged joints suitable for a working pressure of not less than 7 KG/CM² (100 lb./in.²). The flanges are to be machined and the jointing material is to be impervious to oil."

Appellees do not claim that the use of an Emerto brand ferrule in a Serto brand fitting was proper. The lack of symmetry in the joint was obvious to appellant's witness, Mr. Walsh, and was noticeable to even the owners' high managerial representative, Mr. Cockrell.

(2) Furthermore, we hold that there is overwhelming evidence that there was lack of due diligence on the part of the appellees in their failure to man the vessel with a crew properly trained in engine room fire fighting. The engineers' reactions to the fire, including both their failure to utilize the proper equipment available to shut off the flow of oil spewing from the defective joint and their inability to properly utilize the portable fire extinguisher, indicated a lack of fundamental preparation and knowledge of the various means available to efficiently control this type of fire.

A case closely in point and misread by the district court is *Asbestos Corp., Ltd. v. Compagnie de Navigation,* 480 F.2d 669 (CA2 1973). There the vessel THE MARQUETTE suffered an engine room fire. Unlike the case at bar, there was no fault on the part of the owner with respect to the *cause of the fire.* The claimed unseaworthiness involved the location of the fire fighting equipment and its controls in the engine room. At trial, the owners contended that they could be liable only if their personal negligence caused the fire. The district court held for plaintiff. In speaking of the 1851 Fire Statute and the COGSA fire exemption, the appellate court said:

> "Appellants urge as to each a narrow reading of the exception to the exemption. Under their construction,

a fire ignited because of lack of due diligence by the shipowner would result in liability, but failure to maintain equipment adequate to extinguish a nonnegligently ignited fire before it causes the damage would not. Judge Levet rejected this construction. *He held that an inexcusable condition of unseaworthiness of a vessel,* which in fact *causes the damage—either by starting a fire or by preventing its extinguishment*—will exclude the shipowners from the exemption of the Fire Statute and COGSA. *We agree." Id.* at 672. [Emphasis supplied.]

The "*inexcusable* condition of unseaworthiness" mentioned in *Asbestos Corp.* no doubt refers to a condition of unseaworthiness where the carrier did not use due diligence. That is to say, *if the carrier used due diligence, the unseaworthiness would be excusable.*

True enough, the Second Circuit in speaking to both the Fire Statute and COGSA made the statement: "The burden of proof is on the carrier to show that he exercised due diligence. The fire exemption provisions merely *shift this burden of proof to the shipper. If the carrier shows that the damage was caused by fire, the shipper must prove that the carrier's negligence caused the damage." Id.* at 672-673. [Emphasis supplied.] The use of this language was entirely unnecessary to the decision for the reason that the court had already affirmed the trial court's conclusion that the Marquette was unseaworthy because of her owners' failure to exercise due diligence." *Id.* at 672. We quote the key language of the district court opinion:

> "Minimal foresight, however, dictates that the engine room is [a] highly volatile compartment of a ship and the possibility of fire breaking out is ever present.

> *A shipowner must anticipate and provide for the contingency that a fire may break out in the engine room disabling all fire fighting equipment located in the engine room.* The owners of the Marquette through their 'design or neglect' and 'privity or knowledge' were negligent in placing all fire fighting equipment inside the engine room and failing to provide an emergency pump or fire system located or controlled from outside the engine room. This negligence on the part of the shipowners displays a total disregard for minimal protection of cargo and rendered the Marquette unseaworthy. *Under the circumstances this court concludes that the defendants-shipowners are not exempt from liability under COGSA § 1304(2) (b) or the Fire Statute."* 345 F. Supp. 814 at 823. [Emphasis supplied.]

Our overlengthy analysis of the language in *Asbestos Corp.* is prompted by the casual treatment of the burden of proof by the author of the appellate court opinion. Although relying on COGSA, he completely overlooks the language of §§ 1303 (1) and 1304 (1) which places the burden of showing due diligence to provide a seaworthy ship squarely on the shoulders of the carrier. It is this burden that appellees must overcome in order to invoke the exemptions of either § 1304 (2) (b) or the Fire Statute.

In *Albina Engine & Machine Workers v. Hershey Chocolate Corp.,* 295 F.2d 619 (CA9 1961), we held that "neglect of the owner" under the Fire Statute refers to "the neglect of managing officers and agents as distinguished from that of the master or other members of the crew or subordinate employees." P. 621. In the case at bar, however, that distinction is immaterial. Here, the design or neglect was that

of managing officers or supervisory employees, not that of the master or crew or subordinate employees. The "design or neglect" being the failure to provide a proper compression or flange joint and to properly man and equip a trained crew prior to the commencement of the voyage.

Our own court in *New York Mdse. Co. v. Liberty Shipping Corp.*, 509 F.2d 1249 (CA9 1975), has placed *Asbestos Corp.* in proper prospectus. In *Liberty Shipping*, we held there was substantial evidence supporting the trial court's findings that the damage to the cargo resulted from the unseaworthiness of the vessel consisting of the incompetence of the master and the crew who were not properly trained in use of the vessel's fire fighting equipment. As in *Asbestos Corp.*, the cause of the fire which damaged the cargo was actually unknown. Here, we know that the cause of the fire was an improper ferrule. After reviewing the facts, Judge Merrill restated with approval what has been said many times, that fire is the peril most dreaded by mariners and one most difficult to combat in a fully laden ship. That being the fact, he agreed with the trial court that it was *incumbent upon the vessel's owners* to see that the master and the crew were fully trained in the operation and use of fire equipment.

In *Liberty Shipping*, the appellant contended that the district court's decision disregarded the owner's immunity from liability for damage to cargo caused by fire as granted by both the Fire Statute and by COGSA. The court in disposing of this contention quoted the same language cited *supra*, at page 13, from *Asbestos Corp.*, and followed the quotation with the language: "In turn, we agree." The appellant there made essentially the same arguments as

here made by the appellees. In response, the court said:

> "Appellant next contends that the district court has, contrary to the statutory exemptions, placed upon the owner strict liability for the loss suffered by cargo. Appellant reasons that the court, by attributing responsibility for cargo damage jointly to the fire and to unseaworthiness, has placed upon the owner the traditional nondelegable duty to make the ship seaworthy and thus has imposed strict liability. The statutory exemptions, it is contended, do not permit the imposition of liability by nondelegable duty. Appellant relies on *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420 . . . (1932). . . ."
>
> • • • • •
>
> "However, the district court's holding here was entirely consistent with *Earle & Stoddart*. COGSA provides, 46 U.S.C. § 1303(1):
>
> 'The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
>
> (a) Make the ship seaworthy; . . .'
>
> In the case before us liability was not based on the traditional elements by which an owner is held liable for unseaworthiness of his vessel—those related to warranty and nondelegable duty. *Here there was owner neglect and actual fault constituting failure to exercise the due diligence required by COGSA through permitting the vessel to put to sea without having properly trained the master and crew in the use of fire-fighting equipment and without having remedied deficiencies in the vent closing devices. Where the unseaworthy conditions that were the cause of the fire damage existed by reason of owner neglect or actual fault, the exemptions created by the Fire Statute and COGSA do not apply.*" 509 F.2d at 1251-52. [Emphasis supplied.]

Of more than ordinary significance is the fact that the *Liberty Shipping* court did not place upon the shipper the burden of proof on the issue of due diligence. To the contrary, *Liberty Shipping,* by the use of the language: "Here there was owner neglect and actual fault constituting failure to exercise *the due diligence* required by COGSA . . . .", clearly was referring to the due diligence required by COGSA in 46 U.S.C. §§ 1303 (1) and 1304 (1). In § 1304 (1) the burden of proof is placed directly on the carrier by the following language: ". . . Whenever loss or damage has resulted from unseaworthiness, *the burden of proving the exercise of due diligence shall be on the carrier* or other persons claiming exemptions under this section." [Emphasis supplied.]

Appellees argue that the language "this section" ending the last sentence of paragraph 1, 46 U.S.C. § 1304 (1) limits the vitality of the "due diligence" provision to that paragraph and does not apply to paragraph (2), the Fire Exemption Clause of COGSA. This contention is groundless. Appellees fail to recognize that the entire contents of 46 U.S.C. § 1304 were encompassed in "Section 4" of the initial legislation, 49 Stat. 1210. That the Congress was aware of the distinction between "paragraph" and "section" is made crystal clear by the use of the language "in accordance with the provisions of paragraph (1) of Section 3 of this title." This language is used in the same paragraph as the word "section" in "Sec. 4" of COGSA, now § 1304. Obviously, both paragraphs must be read and construed together.

Two Canadian cases, *Maxine Footwear Co., Ltd. v. Canadian Government Merchant Marine, Ltd.* [1959] A.C. 589;

[1959] 2 Lloyd's List L.R. 105, [THE MAURIENNE]; and, *THE ANGLO-INDIAN,* [1944] A.M.C. 1407, are highly persuasive.

Involved in *THE MAURIENNE* is what we might term the Canadian COGSA. Like our own legislation, it was lifted almost word for word from The Hague Rules. The language of the Canadian COGSA with reference to the pertinent sections is almost identical with ours. Of no importance is the fact that the Canadian legislation used the word "Article," rather than the word "Section." Suggesting that the American Congress and the Canadian Parliament were working in unison is the fact that the Canadian Water Carriage of Goods Act was enacted in 1936, the same year that COGSA was enacted by the American Congress. The fact that the language "subject to the provisions of Article IV" appears at the beginning of Paragraph Two of Article III of the Canadian COGSA is of no importance here. The provisions of Article IV would be meaningless if they were not related to Article III. For comparison, we attach, as Appendix B, the equivalent Articles on the Canadian COGSA, corresponding to §§ 1303 and 1304 (1) and (2).

In *THE MAURIENNE* an employee, under instruction from the master, caused a fire by applying a blow torch to cork insulation around certain pipes. The fire spread and resulted in the ship being scuttled, causing substantial loss to the appellant's cargo. The British Privy Council,[3] in

[3]The British Privy Council is the court of last resort for cases emanating from some of the Commonwealth Countries. When *THE MAURIENNE* was decided, decisions of the Canadian Supreme Court could be taken to the Privy Council.

construing the Canadian COGSA legislation and in holding the carrier liable for the damage caused by the fire said, among other things:

> "This unseaworthiness caused the damage to and loss of appellants' goods. *The negligence of the respondents' servants which caused the fire was a failure to exercise due diligence.*
>
> "Logically the first submission on behalf of the respondents was that, in cases of fire, Art. III never comes into operation even though the fire makes the ship unseaworthy. All fires and all damage from fire on this argument fall to be dealt with under Art. IV, Rule 2(b).[4] If this were right, there was at any rate a very strong case for saying that there was no fault or privity of the carrier within that rule, and the respondents would succeed.
>
> "In their Lordships' opinion the point fails. *Art. III, Rule 1,*[5] *is an overriding obligation. If it is not fulfilled and the non-fulfillment causes the damage, the immunities of Art. IV cannot be relied on.* This is the natural construction apart from the opening words of Art. III, Rule 2. The fact that that Rule is made subject to the provisions of Art. IV and Rule 1 is not so conditioned makes the point clear beyond argument." [1959] A.C. 589 at 602-603. [Emphasis supplied.]

The above holding provides a ready answer to appellees' contention that the language "Subject to the provisions of Art. IV" distinguishes the Canadian COGSA from the American COGSA. The language is contained in § 2 of Article III of the Canadian COGSA and makes no refer-

[4] 46 U.S.C. § 1304 (2) (b).
[5] 46 U.S.C. § 1303 (1).

ence whatsoever to § 1 of the same Article which requires the carrier to make the ship seaworthy and to properly man and supply the ship. Congress in enacting the American COGSA merely eliminated the "subject to . . ." language as surplusage.

Another case interpreting the Canadian COGSA and holding that the Article IV (2) (b) (§ 1304 (2) (b)) fire exemption was conditioned upon the exercise of due diligence under Article III (1) (§ 1303 (1)) is *THE ANGLO-INDIAN,* [1944] A.M.C. 1407.

If not in conflict with our decisions, and they are not, we should follow the decisions of the Canadian authorities that have already interpreted The Hague Rules. *See Foscolo, Mango & Co., Ltd. v. Stag Line* [1932] A.C. 328; [1931] 41 Lloyd's List L.R. 165 (1931). It is there said

> "As these rules must come under the consideration of foreign courts, it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the Rules should be construed on broad principles of general acceptation." *Id.* at 350; 174.

In speaking to the legislative history of COGSA, our Supreme Court in *Herd & Co., Inc. v. Krawill Machinery Corp.,* 359 U.S. 297 (1959), has said:

> "The legislative history of the Act shows that it was lifted almost bodily from The Hague Rules of 1921, as amended by The Brussels Convention of 1924, 51 Stat. 233. The effort of those Rules was to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade." *Id.* at 301.

That the district court in our case misinterpreted the significance of the decision of the Canadian court in *THE MAURIENNE* is clearly demonstrated by its conclusion:

> "The plaintiff's reliance on the Canadian authority of *Maxine Footwear Company v. Canadian Government Merchant Marine,* [1959] 2 Lloyd's Rep. 105, is misplaced. Although the Court in that case did place the burden of proving initial seaworthiness on the carrier, that case was dealing with a Canadian statute fashioned on the Hague Rules."

Manifestly, the district court overlooked the fact that COGSA was also fashioned on The Hague Rules.

Having some bearing on our problem is *Waterman Steamship Corp. v. Gay Cottons,* 414 F.2d 724 (CA9 1969), a case in which the shipowner sought limitation of liability under the provisions of the Limitation of Liability Act, 46 U.S.C. § 183 (a). There, the court held that the captain's negligent failure to have the fathometer checked at the next port after the third mate told him it was inoperative did not support a denial of limitation of liability by the owner. It is noted that there was no showing that the fathometer was defective "before and at the beginning of the voyage." The following language of the court's opinion is relevant:

> "Under COGSA, 46 U.S.C. § 1304, the lack of *due diligence of any employee which occurs before or at the beginning of a voyage and results in unseaworthiness is sufficient to preclude complete exoneration of liability.*" *Id.* at 728. [Emphasis supplied.]

The court then went on to discuss the meaning of the language "privity or knowledge" within the meaning of

Limitation of Liability Act, 46 U.S.C. § 183 (a), and then said:

> *"We conclude that standards under the Limitation Act are different from those under COGSA.* The shipowner [under the Limitation Act] is entitled to limitation of liability if it can show that the lack of due diligence is not within its 'privity or knowledge.'" *Id.* at 731. [Emphasis supplied.]

Thus, by implication, it held that the same standard would not apply under COGSA. This is consistent with our holding that the due diligence required "before and at the beginning of the voyage" under COGSA § 1303 cannot be avoided by the "carrier" by either asserting lack of "privity or knowledge" or the exemptions of § 1304 (2). Clearly, an owner cannot close its eyes to what prudent inspection would disclose. *Waterman Steamship Corp. v. Gay Cottons, supra,* at 739.

Despite appellees argument to the contrary, we do not believe the provisions of Section 8 of the original COGSA, 46 U.S.C. § 1308, invalidates or in any manner affects COGSA'S requirements that the carrier shall be bound to *exercise due diligence* to make the ship seaworthy. Section 1308 provides that the provisions of the legislation shall not affect the rights and obligations of the carrier under the Fire Statute and other legislation. As we have already said, the Fire Statute must be read in the light of COGSA, the more recent legislation. In *New York York* [sic] *Mdse. Co. v. Liberty Shipping Corp.,* 509 F.2d 1249 at 1251-52, we held that an owner could not rely upon either fire exemption unless the owner had exercised the due diligence required by COGSA. To construe Section 8 in conformity

with appellant's contention would nullify the language of Sections 3 and 4, 46 U.S.C. §§ 1303 and 1304, dealing with due diligence and the burden of proof, and render meaningless the positive language these sections added to the prior legislation.

APPELLEES' AUTHORITIES

The cases cited by the appellees involved either fires resulting from the carrier's failure to properly and carefully load, handle, stow, carry, care for and discharge the goods carried as required by Section 3, Paragraph 2, of COGSA, 46 U.S.C. § 1303 (2), or decisions made prior to the effective date of COGSA.

The decisions with reference to fire caused by negligent stowage are of no help on our facts. COGSA treats the responsibility for stowage separately and distinct from the responsibility of providing a seaworthy ship and to properly man. equip and supply the ship. A casual reading of Section 3 reveals this distinction. In other words, the failure to properly stow the goods has nothing to do with the failure to make the ship seaworthy or the failure to properly man, equip, and supply the ship. Section 4 (1) of COGSA, speaking to the burden of proof and the exercise of due diligence, specifically mentions Paragraph 1 of Section 3 with reference to unseaworthiness and to properly man and equip the ship but makes no reference whatsoever to the stowage provisions of Paragraph 2 of Section 3. Consequently, the "due diligence" and "burden of proof" provisions of Sections 3 and 4 of COGSA are not applicable to Paragraph 2, the stowage provisions of Section 3.

Typical of appellees' cases is *A/S J. Ludwig Mowinckels Rederi v. Accinanto, Ltd.*, 199 F.2d 134 (CA4 1952), which involved a fire and explosion resulting from spontaneous combustion in the cargo. True enough, the defendants sought to invoke the protections of the Fire Statute and the COGSA fire exemption. It is clear, however, that the court was primarily concerned with deciding whether the cargo had been stowed negligently by the stevedore. There was only a limited mention of the COGSA Fire Exemption, § 1304 (2) (b), the case being principally concerned with the stowage. In reading these cases, we must keep in mind that the Limitation of Liability Act (46 U.S.C. §§ 181-189) was there directly involved, while COGSA was not. Whatever the *Accinanto* court said with reference to the COGSA Fire Exemption would not control us here in that the provisions of Section 3 (1) and Section 4 (1) of COGSA were not in issue.

Another case cited by appellees which involved improper stowage of goods is *Automobile Ins. Co. v. United Fruit Co.*, 224 F.2d 72 (CA2 1955). But there the Second Circuit affirmed the district court's holding that plaintiffs had failed to show that the fire was caused by the cargo of bleaching powder much less by any improper stowage of that cargo. Again, Section 3 (1) and Section 4 (1) of COGSA were not properly before the court. Citing *Accinanto, supra,* the court continued the dictum that the purposes of the 19th Century Fire Statute and the COGSA Fire Exemption were the same. Neither case recognizes that the Limitation of Liability Act of which the Fire Statute was a part, was designed solely for the benefit of the shipowner. It is undisputed that the purpose of COGSA

was to upgrade the protection afforded the cargo owners and downgrade the protection afforded the interests of the shipowners and charterers.

Another case involving improper stowage which caused a fire cited by appellees is *American Tobacco Co. v. THE KATINGO HADJIPETERA,* 81 F. Supp. 438 (SD NY 1948), *modified* 194 F.2d 449 (CA2 1951). That case focused almost exclusively upon the Fire Statute with but passing reference to COGSA. *See* 81 F. Supp. at 446. In any event, the decision of the district court was nullified when the court of appeals held that the stowage of the cargo was not negligent.

Appellees cite *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.,* 287 U.S. 420 (1932), in support of their theory. However, the case was decided in 1932, some four years before the enactment of COGSA. Again, this was a stowage case. The owners sought exoneration under the 19th Century Fire Statute. There, the cargo owners relied upon several cases interpreting Section 3 of the Harter Act, 46 U.S.C. § 192, which contains a number of the exemptions now included in COGSA, Section 4 (2). Those cases held that the immunities in Section 3 of the Harter Act were granted only if *the carrier first established* that all of its employees exercised due diligence to make the vessel in all respects seaworthy. The Supreme Court affirmed the holding of those cases, but observed that Section 3 of the Harter Act did not contain an immunity for fire liability and, therefore, did not create any general duty of due diligence on the part of the shipowners which would condition immunity under the Fire Statute. 287 U.S. at 426-27. From our analysis it is clear that COGSA has made due

diligence under § 1303 (1) a prerequisite to claiming any exemption under § 1304 (2), and fire is included within these exemptions.

DEVIATION

Our examination of the record convinces us that the trial judge's finding that the Guayaquil call was not an unreasonable deviation is not clearly erroneous. In light of our holding, we need not decide whether our pre-COGSA decision in the *HERMOSA*, 57 F.2d 20, 27 (CA9 1932), correctly allocates the burden of proof on the issue of whether a reasonable deviation contributed to a particular loss under 46 U.S.C. § 1304 (4).

CONCLUSION

We adopt, as the law of our circuit, the construction placed on The Hague Rules by their Lordships in *THE MAURIENNE,* and hold that the provisions of Section 3, Paragraph 1, COGSA, create an overriding obligation and if that obligation is not fulfilled and the nonfulfillment causes the damage, the fire immunity of Section 4, Paragraph 2 (b), cannot be relied upon by appellees. This overriding obligation to exercise due diligence to: (a) make the ship seaworthy, and (b) properly man, equip, and supply the ship applies to the master and those in the management of the ship, as well as to the owners or charterers personally, or those who act for the owners in a managerial capacity. For non-application of the Fire Statute, *see Liberty Shipping, supra,* at 1251-52.

Our analysis of the record convinces us that the appelless also failed to carry their burden of proof on the issue

of exercising due diligence to make the ship seaworthy as required by Section 4, Paragraph 1, 46 U.S.C. § 1304 (1). Consequently, the district court's findings of fact rested upon an erroneous view of the law as expressed in its conclusions. It is practically conceded that the improper ferrule in place at the commencement of the voyage, permitted the volatile diesel oil to spray on the generators and thus was the proximate cause of the damage resulting from the fire. Moreover; as in *Asbestos Corp.*, it was not "crew negligence" that either started the fire or prevented its extinguishment, but a failure to properly train the crew in what to do in case of engine room fires and in the use of fire fighting equipment. This unperformed obligation required by Section 3 (1) (b) also was a cause of the damage. Therefore, the overall cause of the breakdown of the vessel's refrigeration equipment, which forced the appellant to donate the cargo of citrus fruit to the Ecuadorian government, was the failure of the appellees to fulfill their obligations as required by COGSA. It was not the fire. Accordingly, the findings, conclusions, and judgment of the district court are set aside and the cause remanded for further proceedings in conformity with our conclusions, including the entry of an appropriate judgment in favor of appellant.

IT IS SO ORDERED.

APPENDIX A

For example: (1) the addition of fire to the exemptions of the Harter Act, Article 4, Par. 2, 51 Stat. 251 [46 U.S.C. § 1304 (2) (b)]; (2) the burden of proof on the exercise of due diligence by the carrier, Article 4, Par. 1, 51 Stat. 251 [46 U.S.C. § 1304 (1)]; and, (3) the due diligence required of the carrier "before and at the beginning of the voyage.", Article 3, Par. 1, 51 Stat. 249 [46 U.S.C. § 1303 (1)].

APPENDIX B

The material portions of the Canadian Water Carriage of Goods Act provide:

"Article III.

RESPONSIBILITIES AND LIABILITIES—

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(a) make the ship seaworthy;

(b) properly man, equip, and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

"Article IV.

RIGHTS AND IMMUNITIES

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

"Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of

due diligence shall be on the carrier or other person claiming exemption under this section.

"2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from, . . .

"(b) fire, unless caused by the actual fault or privity of the carrier;"

APPENDIX C

United States Court of Appeals
Ninth Circuit

No. 76-3112

Sunkist Growers, Inc.
Plaintiff-Appellant,

vs.

Adelaide Shipping Lines, Ltd.,
Claimant-Appellee,

and

Salen Reefer Services AB, and
M/V Gladiola,
Defendants-Appellees.

[Filed Apr. 19, 1979]

Appeal from the United States District Court
Northern District of California

ORDER

Before: DUNIWAY and KILKENNY, Circuit Judges,
and McGOVERN, District Judge.*

Appellees' petition for rehearing is denied.

Upon remand, the district court may consider the issues raised by appellant's motion to add interest and to award attorney fees.

*The Honorable Walter T. McGovern, United States District Judge for the Western District of Washington, sitting by designation.